

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANT: Solo Inc.

**CASE 76D-0019-R-2022**

76D 140712-00

76D 140713-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

Water Right Claims 76D 140712-00 and 76D 140713-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. These claims received issue remarks. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order.

Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims did not receive any objections or notices of intent to appear.

The Court consolidated these claims into Water Court Case 76D-0019-R-2022 on August 11, 2022. The consolidation order set a deadline by which Claimant was to file information resolving the issue remarks. Fred Sturdevant filed a response on October 12, 2022.

### **FINDINGS OF FACT**

1. Claim 76D 140712-00 appeared with the following issue remark:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 7/26/1926.

2. Claim 76D 140713-00 appeared with the following issue remarks:

THE FLOW RATE IS MISSING.

POINT OF DIVERSION AND MEANS OF DIVERSION WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

3. Fred Sturdevant is the president of Claimant Solo Inc. Mr. Sturdevant attached the Notice of Appropriation of William E. Butts as proof of the priority date of Claim 76D 140712-00. Mr. Sturdevant confirmed that Claim 76D 140713-00 was not decreed with a flow rate.

4. The original Statement of Claim of Claim 76D 140712-00, filed on April 27, 1982 by Fred Sturdevant, states the priority date is August 1, 1926.

5. Support for the claim includes an Affidavit of Wayne Butts and a Notice of Appropriation filed by William Butts.

6. Wayne Butts states in his affidavit, dated March 29, 1982, that the property owned by Solo Inc. was originally owned by his father, Harold Butts. The property was

purchased in 1916. Wayne Butts states water was used for irrigation, stock water, and domestic use “since that time.”

7. The Notice of Appropriation was filed with Lincoln County by William Butts on July 26, 1926. In the Notice, Mr. Butts states he appropriated water from “one of the tributaries of Young Creek” on August 10, 1916. Mr. Butts indicated he posted a notice of intended diversion on July 17, 1926.

8. The current priority date does not match any of the dates mentioned in the Notice or Affidavit. It is unclear as to why Mr. Butts posted a notice to mark a point of intended diversion after the water was allegedly already being used previously. It is also unclear why DNRC suggested the date of filing the Notice as the true priority date.

9. The only consistency in the record regarding the date of first use of the claimed water right is the year 1916.

10. The source claimed by Claim 76D 140712-00 is Spring Creek, which is a tributary of Young Creek.

11. The only other water rights owner who could be affected on Spring Creek<sup>1</sup> is Gabriela E. Orr Living Trust, which owns Claim 76D 100437-00 with a priority date of December 31, 1936.

12. Other water rights owners on Young Creek would not be affected if the priority date were changed to July 26, 1926 or August 10, 1916 as the priority dates of water rights owned by other parties are either senior to 1916 or junior to 1926.

13. Changing the priority date to as early as August 10, 1916 would not affect the overall order of priority on either Young Creek or Spring Creek.

14. The priority date of Claim 76D 140712-00 should be described as August 10, 1916.

15. Claim 76D 140713-00 is for subirrigation. Subirrigation claims are typically not decreed with quantified flow rates. Rule 14(d)(6), W.R.C.E.R.

16. The flow rate of Claim 76D 140713-00 should be described with the following information remark:

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<sup>1</sup> The claimed source of Claim 76D 100437-00 is an unnamed tributary of Spring Creek.

“NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF  
NATURAL SUBIRRIGATION.”

17. The issue remarks should be removed from the above-captioned claims.

**APPLICABLE LAW**

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.
3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.
4. Before July 1, 1973, appropriators were required to post notice of their intent to appropriate the water at the intended point of diversion. Within twenty days of the date of appropriation, the appropriator was required to file a notice of appropriation with the county clerk. If the appropriator failed to comply with the requirements of Section 89-810, they could not relate their priority date back to the posting of the notice of intent to appropriate water. Section 89-814, RCM (1947) (Repealed 1973).
5. The Court may admit defective notices of appropriation and review them as evidence in support of a priority date. The weight and ultimate value should be evaluated like any other piece of evidence before the Water Court. *Lee E. Foss v. United States of America (USDA-Forest Service)*, Case 76HF-580 at p. 18, (MT Water Court Order Amending and Partially Adopting Master’s Report as Amended Jan.31, 2013).
6. If the Court sets a priority date incorrectly, but the incorrect or arbitrary priority date does not affect the order of priority on a source, the incorrect priority date is harmless error. *Vidal v. Kensler*, 100 Mont. 592, 594, 51 P.2d 235, 236, 1935 Mont. LEXIS 114, \*2 (Stating: “The date of an appropriation appearing in a water right decree

is material only in its relation to the question of priority. . . There is, therefore, no valid objection to the fixing of an arbitrary date of appropriation, and, if an incorrect date is given, the error is harmless unless the objecting claimant can show that his right antedates the date fixed for another instead of being subsequent thereto, as appears from the decree.”)

7. Claims for subirrigation water rights are not decreed with a quantified flow rate. Rule 14(d)(6), W.R.C.E.R.

### **CONCLUSIONS OF LAW**

1. The Court may modify the priority date of Claim 76D 140712-00 because the sworn statements in the 1982 affidavit and 1926 Notice of Appropriation overcome the prima facie status of the claim by a preponderance. The Court may review and weigh the Notice of Appropriation even though it appears to be defective. Additionally, the modified priority date of August 10, 1916 does not affect the order of priority on either the claimed source, Spring Creek, or the source to which it is tributary, Young Creek.

2. The Court may describe the flow rate of Claim 76D 140713-00 with an information remark because doing so would conform the claim to the Claims Examination Rules.

3. The changes described in the Findings of Fact and the information in the record provide the Court with a sufficient basis to resolve and remove the issue remarks from each above-captioned claim.

### **RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state’s centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

Solo Inc.  
7983 W Kootenai Rd  
Rexford, MT 59930

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
KOOTENAI RIVER  
BASIN 76D**

**Water Right Number:** 76D 140712-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** SOLO INC  
7983 W KOOTENAI RD  
REXFORD, MT 59930

**Priority Date:** AUGUST 10, 1916

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.08 CFS

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 43.00

**Source Name:** SPRING CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSWNE	15	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DIKE					
2		SWSWNE	15	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DIKE					
3		SESENW	15	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DIKE					
4		NESENW	15	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DIKE					
<b>Period of Use:</b>	MAY 1 TO SEPTEMBER 1					

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00		W2NWSE	15	37N	28W	LINCOLN
2	13.00		W2SWNE	15	37N	28W	LINCOLN

3	20.00	SENW	15	37N	28W	LINCOLN
Total:	43.00					

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

140710-00

140711-00

140712-00

140713-00



**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
KOOTENAI RIVER  
BASIN 76D**

**Water Right Number:** 76D 140713-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** SOLO INC  
7983 W KOOTENAI RD  
REXFORD, MT 59930

**Priority Date:** MAY 1, 1920

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION  
**Irrigation Type:** FLOOD

**Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF NATURAL SUBIRRIGATION.

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 167.55

**Source Name:** SUBIRRIGATION, UNNAMED TRIBUTARY OF SPRING CREEK  
**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENE	16	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DRAIN DITCH					
2		SENESE	16	37N	28W	LINCOLN
<b>Period of Diversion:</b>	MAY 1 TO SEPTEMBER 1					
<b>Diversion Means:</b>	DRAIN DITCH					
<b>Period of Use:</b>	MAY 1 TO SEPTEMBER 1					

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		SWSWSW	10	37N	28W	LINCOLN
2	130.00		NW	15	37N	28W	LINCOLN
3	15.00		W2SWNE	15	37N	28W	LINCOLN
4	19.55		W2NWSE	15	37N	28W	LINCOLN
<b>Total:</b>	167.55						

**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

140710-00	140711-00	140712-00	140713-00
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